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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1947

No. 511

VINCENT BRUNO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Vincent Bruno, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit entered in the above case on December 3, 1947.

OPINIONS BELOW.

No opinion was delivered in the District Court; the per Curiam Opinion and Concurring Opinion of the Circuit Court of Appeals (R. 92-94) have not yet been reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on December 3, 1947 (R. 95). The jurisdiction of this court is invoked under Section 240 of the Judicial Code, as amended.

QUESTION PRESENTED.

Petitioner was convicted of unlawfully selling, dispensing and distributing a certain quantity of heroin not in or from the original stamped package contrary to the provisions of the Harrison Narcotic Act, 26 U.S.C. 2553. He was convicted, also, under a second count in the same indictment, of having violated the provisions of the Jones-Miller Act (21 U.S.C. 174) in having fraudulently and knowingly concealed the same lot of heroin mentioned in the first count. The sole evidence introduced by the Government to support the two charges was the testimony of one witness who claimed that petitioner sold and delivered to him the heroin in question. Having thus shown that petitioner had possession of the narcotic, the Government relied for proof of its case on two presumptions; (1) on the presumption in the Harrison Narcotic Act which

makes possession of the drug in the absence of appropriate tax-paid stamps prima facie evidence of a violation, and (2) on the presumption contained in the Jones-Miller Act which provides that possession of the drug is sufficient to authorize conviction under that Act. Petitioner was sentenced to consecutive sentences on these two counts.

The question presented is: may petitioner be punished twice for one act where, because of presumptions in two separate but related statutes, the identical act is declared to be evidence of violation of those statutes.

STATUTES INVOLVED.

The pertinent provisions of the Harrison Narcotic Act (26 U.S.C. 2553) are as follows:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; * * *

The pertinent provisions of the Jones-Miller Act (21 U.S.C. 174) are as follows:

> If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or

receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

STATEMENT.

Petitioner, on August 20, 1945, was employed as manager of a tavern in San Francisco, California, owned by his brother (R. 60). About 10:30 P.M. on that day, a special Government employee by the name of Lieberman met with petitioner at the tavern (R. 44-45). Immediately thereafter, the two men went to the men's room on the premises where petitioner sold Lieberman a bindle of heroin for $50.00 (R. 45-46). Petitioner, at the trial, denied that he sold Lieberman any narcotics (R. 60-63), but for the purposes of this petition Lieberman's testimony is accepted as true.

Upon conviction, petitioner was sentenced to five years' imprisonment on the first count and to ten years' imprisonment and to pay a fine of $5,000 on the second count, the sentences to run consecutively.

REASONS FOR GRANTING THE WRIT.

1. The court below has decided a substantial question in a way probably in conflict with the pronouncements of this Court in *Blockburger v. United States,* 284 U.S. 299. In that case this Court stated, "The applicable rule [in determining whether a single act may be an offense against two statutes] is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not" (at 304). Applying this test to the instant case it is apparent at once that only one punishable offense was committed by petitioner, for, by statute, the same fact satisfied the requirements for conviction under both counts.

No case decided by this Court has departed from that test. In the cases previously submitted for this Court's decision, each of the counts of the indictment required proof of a fact or facts not necessarily required in proving the other counts for which the defendant was indicted. See, for example, *United States v. Michener,* 331 U.S. 789, where this Court considered the problem whether a defendant who was convicted of making a plate to be used in counterfeiting Federal Reserve Notes could be sentenced also for having the same plate in his possession. Obviously, proof of possession alone in that case did not establish that the defendant had made the plate for which he was also convicted; to warrant conviction under the second count, it was necessary to show, even after proof of

possession under the first count, that defendant had made the plate. Here, however, because of the presumptions contained in the statutes, the same possession, without more or less, constituted two crimes. The court below, however, ignored this Court's admonition that to constitute two offenses each count must require "proof of an additional fact which the other does not," and held that two offenses were satisfactorily established within the law.

2. The decision of the court below is in square conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Copperthwaite v. United States,* 37 F. (2d) 846. The facts in this case present the identical question as the facts in the *Copperthwaite* case. In that case, as here:

> Appellants were convicted under both counts of an indictment, the first of which charged the purchase and sale of unstamped morphine in violation of the Harrison Anti-Narcotic Act (Sec. 692, Tit. 26 U.S.C.A.)[1], and the second of which charged, as of the same time and place, the buying and selling of the same amounts of morphine which they knew had been unlawfully imported into the United States, thus constituting an offense under the Narcotic Import Statute (Sec. 174, Tit. 21, U.S.C.A.). They were sentenced to five years imprisonment under the first count and ten years under the second count—the two terms to be concurrent. (At 847.)[2]

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[1]Now section 2553 of the same title.

[2]In the instant case, appellant was sentenced to five years imprisonment on the first count and to ten years imprisonment and to pay a fine of $5,000 on the second count, the sentences to run consecutively. In the *Copperthwaite* case, the court ultimately decided that since the sentences ran concurrently that the error was not prejudicial.

With respect to the question of double punishment, the court said:

> * * * The entire proof in this case consisted of evidence that the defendants agreed to furnish and sell morphine to a purchaser and thereafter did have it (unstamped) in their possession and deliver it to him. By virtue of the presumption declared in the Harrison Act, this possession tended to show the forbidden purchase; and the same possession also tended—by virtue of the presumption declared in the Import Act—to show unlawful importation and defendants' knowledge. In such case the government may punish for either offense, but we think the supporting evidence does not so materially vary as to justify two punishments, merely because two inferences are attached by different statutes to the same evidential basis. (At 847-848.)

Here, as in the *Copperthwaite* case, the sole evidence adduced by the Government was the naked sale of heroin by appellant to a special Government employee. No attempt was made to show that the narcotic did not come from the original stamped package or that petitioner, in fact, concealed or aided the concealment of the heroin.[3] Under each statute the Government

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[3]Judge Denman, in his Opinion concurring in the result of the majority in the court below, was of the opinion that there was "evidence of concealment, namely, in the surreptitious method pursued by the deliverer of the heroin, showing his desire to avoid discovery of the heroin in his possession by the government officers or anyone who would communicate with them" (R. 94). This conclusion not only was not accepted by the majority but is based on an unwarranted assumption. Judge Denman apparently assumed that it was appellant who had concealed the narcotics in the men's washroom. The record, however, is wholly consistent with the proposition that the heroin was concealed by another and thereafter sold by appellant. Moreover, without the statutory presumption, it could hardly be argued that there was sufficient evidence to warrant conviction under the second count.

relied for its proof on presumptions, each of which rested on the possession of the same heroin at the same time by petitioner, just as in the *Copperthwaite* case.

The question before the court below in the instant case, therefore, was identical with the question decided in the *Copperthwaite* case. In the instant case, the majority in the court below, relying on its decision in *Sorrentino v. United States,* 163 F. (2d) 627, decided that the Ninth Circuit Court of Appeal had already, "necessarily rejected or distinguished" the holding in the *Copperthwaite* [illegible] (R. 93).[4] There was no discussion of the point [illegible] *Sorrentino* case. (R. 93.)

This conflict in the decisions of the Sixth and Ninth Circuit Courts of Appeal has not been resolved by the decision of this Court in *United States v. Michener,* 331 U.S. 789. There, as pointed out above, all the facts necessary to prove each offense was contained within the testimony adduced at the trial, and furthermore, one of the counts required proof of a fact not required in the other count. Here, however, both counts were premised on the same single fact, viz., possession; nothing more was required under either count. Moreover, the decisions in the *Sorrentino* and *Bruno* cases were handed down by the Ninth Circuit Court of Appeals after the decision of this court in the *Michener* case, which was cited to the court in the briefs of both cases; in neither case did the court feel that the *Michener* case had disposed of the problem.

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[4]Judge Denman, in his concurring opinion, stated that he could not agree that the *Sorrentino* case "rejected" the holding in the *Copperthwaite* case (R. 94), thereby supporting the argument that the court below squarely rejected the holding in the *Copperthwaite* case.

3. The problem presented here has application beyond this case alone. Since the presumptions are contained in statutes that are interrelated (for the purpose of controlling illicit traffic in narcotics), they are customarily coupled by the United States Attorneys in prosecuting defendants in whose possession unlawful narcotics are found. Thus, it is common to find, as in the case at bar, a count charging violation of the Harrison Narcotic Act and a count charging violation of the Jones-Miller Act, both based on possession alone. See, for example, *Silverman v. United States,* 59 F. (2d) 636 (C.C.A. 1), certiorari denied 287 U.S. 640; *Chadwick v. United States,* 117 F. (2d) 902 (C.C.A. 5); *Copperthwaite v. United States,* 37 F. (2d) 846 (C.C.A. 6); *Sorrentino v. United States,* 163 F. (2d) 627 (C.C.A. 9); *Gargano v. United States,* 140 F. (2d) 118 (C.C.A. 9); *Parmagini v. United States,* 42 F. (2d) 721 (C.C.A. 9), certiorari denied 283 U.S. 818; *Mills v. Aderhold,* 110 F. (2d) 765 (C.C.A. 10); *Ex parte Thomas,* 55 F. Supp. 30 (E.D. Ky.).

The Government seems to find apparent authority for its practice in seeking double punishment under the two Acts in the language of the decisions in the cases just cited declaring that a defendant may properly be indicted for both offenses. In the court below, for example, the United States Attorney argued that the problem involved here is governed by the decision in the *Silverman* case, *supra.* In that case, the question presented was whether an indictment which charged two offenses similar to the ones charged here

constituted two separate offenses. The problem here, however, is different. Petitioner concedes that the indictment sets out two separate offenses; for had the Government been able to show the actual concealment of the heroin prior to the sale as well as the sale from an unstamped package, two separate offenses would have been established. And since the indictment charged facts which, *if proved,* would have constituted two separate offenses, the indictment was sufficient and appellant was not *tried* twice for the same offense. *Gargano v. United States,* 140 F. (2d) 118 (C.C.A. 9); *Silverman v. United States,* 59 F. (2d) 636 (C.C.A. 1), certiorari denied 287 U.S. 640. But such proof was not produced. The problem, therefore, is not one of the sufficiency of the indictment but rather whether two separate offenses were sufficiently proved to warrant two sentences.

CONCLUSION.

The issue raised in the case at bar raises an important question of the application of the Fifth Amendment to the Constitution over which the Circuit Courts of Appeal for the Sixth and Ninth Circuits have disagreed. Moreover, the decision of the court below in this case is in apparent conflict with a rule laid down by this Court. The question occurs frequently since the statutes out of which the problem arises are interrelated. The problem, furthermore, is of real practical importance because severe punishments usually follow upon convictions. Accordingly,

petitioner respectfully prays that this petition for a Writ of Certiorari be granted.

Dated, San Francisco, California,
December 29, 1947.

Respectfully submitted,
WALTER H. DUANE,
Attorney for Petitioner.

ALBERT A. SPIEGEL,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 511

VINCENT BRUNO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The judgment of the circuit court of appeals affirming petitioner's conviction was entered on December 3, 1947 (R. 95). No petition for rehearing was filed in the circuit court of appeals, nor did this Court or any justice thereof extend the time for filing a petition for a writ of certiorari. The petition for a writ of certiorari was not filed until January 3, 1948, more than thirty calendar days after the entry of the order of the circuit court of appeals affirming the conviction. The petition is, therefore, out of time under Rules 37 (b) (2) and 45 (a) of the Federal Rules of

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Criminal Procedure and should be denied for want of jurisdiction.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

JANUARY 1948.

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